BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MATTHEW VANNORDSTRAND Claimant VS. **TMS CONSTRUCTION &** **DF OSBORNE CONSTRUCTION, INC.** Respondents AND **KANSAS BUILDING INDUSTRY WC FUND** Insurance Carrier AND **KS WORKERS COMPENSATION FUND** Fund	)	Docket No. 1,025,540

ORDER

DF Osborne Construction, Inc. and Kansas Building Industry Workers Compensation Fund request review of the March 23, 2006 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that claimant was injured in a compensable incident of horseplay and granted claimant's request for medical treatment.[1]

Respondent DF Osborne Construction, Inc. and the Kansas Building Industry Workers Compensation Fund (respondent) request review of the ALJ's finding that claimant's injury which resulted from an accident occurring during an act of horseplay at

[1] There were other issues presented to the ALJ at the preliminary hearing, including a request by the Kansas Workers Compensation Fund (Fund) to be dismissed from this action. However, those issues are not the subject of this appeal. Only the underlying compensability of claimant's accident is at issue.

a construction site was compensable. Respondent contends that claimant's voluntary act of horseplay was expressly prohibited by his employer. Thus, respondent believes the ALJ's reliance upon *Baggett*[2] was erroneous and the ALJ's preliminary hearing Order should be reversed.

Claimant urges the Board to affirm the ALJ's Order in all respects. Claimant maintains that *Baggett* is precisely on point and justifies a finding of compensability. Claimant also argues that horseplay was a regular incident of employment and as such, claimant's injury is therefore compensable.[3]

The sole issue for purposes of this appeal is whether claimant's injury arose out of and in the course of his employment with respondent DF Osbourne Construction, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant was injured while working at a construction site in Topeka, Shawnee County, Kansas on August 11, 2005. There is likewise no dispute that while working for respondent as a framer, claimant and his co-worker (and uncle) were engaged in horseplay at the time of claimant's accident.[4] As they were shadowboxing, claimant stepped backwards and fell backwards through an opening in the floor, falling approximately 9 feet onto a concrete floor where he struck the back of his head. Claimant admits that he and his uncle had engaged in this sort of horseplay before and that they had been warned by Thomas Oliver, their direct employer not to do so on one earlier occasion. Claimant testified that he had seen Mr. Oliver do the same thing with another worker. But claimant admits he does not remember if he saw this when Mr. Oliver was at work or elsewhere.

Based upon this evidence, the ALJ concluded that "[c]laimant's alleged accidental injury did arise out of and occur in the course of employment."[5] This Order goes on to reference *Baggett*[6] as justification for finding claimant's accidental injury compensable.

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[2] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[3] *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.3d 137 (1966).

[4] P.H. Trans. at 6; Marty VanNordstrand Depo. at 8.

[5] ALJ Order (Mar. 23, 2006).

[6] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

K.S.A. 2005 Supp. 44-501(a) states, in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

Arising "out of" the employment is defined as follows:

> An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[9]

The ALJ relied upon the principles set forth in *Baggett*, and the Board agrees. *Baggett* involved an employee who was assaulted by a co-worker over a monetary loan. The offending co-worker pushed Mr. *Baggett*, who turned around and backed up a few steps, falling twelve feet into a hole on the construction site. The Court of Appeals concluded that in spite of the personal nature of the assault, the workplace presented an additional hazard which transformed the assault into a compensable injury.[10]

Like *Baggett*, the claimant's workplace presented an additional hazard to this claimant. The act of engaging in shadowboxing did not cause claimant's injury, it was the fall into the exposed lower floor.

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[7] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[8] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 502, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[9] *Newman v. Bennett,* 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 502, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

Based upon this precedent, this Board Member finds the ALJ's preliminary hearing Order should be affirmed. While it may be that this scenario presents a reasonable exception to the rule in *Baggett*,[11] as the law presently stands, claimant's accidental injury arose out of and in the course of his employment with respondent. Therefore, the preliminary hearing Order is affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated March 23, 2006 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and Kansas Building Industry WC Fund
Matthew R. Bergmann, Attorney for Kansas Workers Compensation Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] If it is shown that horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable. See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919). Under these facts, the employer expressly told claimant to refrain from shadowboxing and only after claimant failed to heed that warning, did he become injured. It may be that purposeful horseplay, as here, should be considered a valid exception to the *Baggett* rationale.